

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the
Commission's Own Motion to Assess and Revise
the Regulation of Telecommunications Utilities.

Rulemaking 05-04-005
(Filed April 7, 2005)

**ASSIGNED COMMISSIONER'S RULING DENYING
MOTION FOR RECONSIDERATION**

Cox California Telcom, Inc. (Cox) has moved for reconsideration of the Law and Motion Administrative Law Judge's (ALJ) ruling of August 31, 2005, granting Pacific Bell Telephone Company's (SBC) motion to compel Cox to provide full responses to data requests. I deny Cox's motion and decline to refer this matter to the full Commission because Cox has not provided facts or legal arguments sufficient to demonstrate extraordinary circumstances warranting interlocutory review of the Law and Motion ALJ's ruling.

The Commission discourages interlocutory appeals concerning procedural and evidentiary matters except for extraordinary circumstances. Our reluctance to entertain interlocutory matters avoids piecemeal litigation and prevents vexatious interference with the Commission's regulatory functions and ability to complete its proceedings within the statutory time periods. (*See, e.g., Investigation into the Gas Market Activities of Southern California Gas Company et al.*, D.05-05-006, 2005 Cal. PUC LEXIS 169 at *6 (2005).)

Nothing in the Public Utilities Code or in our Rules of Practice and Procedure authorizes interlocutory appeals as a right of the parties. (*In re Roseville Telephone Co.*, D.99-06-051, 1999 Cal. PUC LEXIS 308 at *42 (1999).) Rule 65 allows the presiding officer to refer evidentiary rulings to the

Commission in extraordinary circumstances when necessary to promote substantial justice. Although the rule does not explicitly apply to discovery rulings, our decisions and practice have recognized that the presiding officer likewise might, under extraordinary circumstances, refer discovery rulings to the Commission for interlocutory review. (*See, e.g., Investigation into the Gas Market Activities of Southern California Gas Company et al., supra; In re AT&T Communications of California, Inc. & WorldCom, Inc.*, D.02-05-042, 2002 Cal. PUC LEXIS 286 at *32 (2002).)

The California courts provide guidance on what constitutes “extraordinary circumstances” that might merit interlocutory review of discovery rulings. Such circumstances include cases where a claim of privilege is at issue (*Sav-On Drugs Inc. v. Superior Court*, 15 Cal. 3d 1, 5 (1975)), where a party is denied access to information necessary for a fair hearing (*Waicis v. Superior Court*, 226 Cal. App. 3d 283, 286-087 (1st Dist. 1990)), and where the question is “of general importance to the trial courts and the profession, and when broad principles can be enunciated to guide the courts in future cases” (*Vinson v. Superior Court*, 43 Cal. 3d 833, 838 (1987)).

None of these considerations apply to the discovery dispute here. Cox does not object to the discovery request on a claim of privilege; the discovery ruling grants, rather than denies, access to information; and Cox has not demonstrated that the question at issue requires the enunciation of broad principles in order to provide guidance to the Commission in future cases.

The question at issue is not complex. The ALJ ruling relies on rules of evidence, civil procedure and law for the well-established principle that relevant information within a party’s possession, custody or control is discoverable. The ALJ granted SBC’s discovery motion because Cox is a party to the proceeding

and the requested Cox-specific information is relevant, having a tendency to prove or disprove, not only the extent of industry-wide competition, but also the credibility of Cox's factual assertions regarding ability to compete. Cox has not convincingly demonstrated that the requested information is irrelevant, and does not challenge that it is within its control to produce.

Instead, Cox maintains that the Commission lacks the authority to compel the production of information regarding matters which it does not regulate. Cox does not offer any legal authority for this assertion. Indeed, the concept runs counter to reason and practice: while the Commission does not have regulatory jurisdiction over, for example, gas prices or the tax codes, it certainly has the authority to compel the production of otherwise discoverable information regarding these topics.

Regarding Cox's concern that it was not permitted to present oral argument, Cox had ample opportunity to address, in its opposition, all arguments made in support of the motion to compel, and it appears that the ALJ fairly and completely considered all arguments Cox made on the subject.

Cox has not demonstrated the extraordinary circumstances warranting interlocutory review of the Law and Motion ALJ's discovery ruling.

IT IS RULED that:

1. Cox California Telcom, Inc.'s motion for reconsideration of the Administrative Law Judge's August 31, 2005, ruling is denied.
2. Cox California Telcom, Inc. shall produce the disputed material by no later than Friday, September 9, 2005.

Dated September 6, 2005, at San Francisco, California.

/s/ SUSAN P. KENNEDY

Susan P. Kennedy
Assigned Commissioner

CERTIFICATE OF SERVICE

I certify that I have by mail this day served a true copy of the original attached Administrative Law Judge's Ruling Denying Motion for Reconsideration on all parties of record in this proceeding or their attorneys of record.

Dated September 6, 2005, at San Francisco, California.

/s/ JANET V. ALVIAR

Janet V. Alviar

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.